taxnotes®

state & local

Volume 87, Number 9 ■ February 26, 2018

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Reprinted from *State Tax Notes*, February 26, 2018, p. 799

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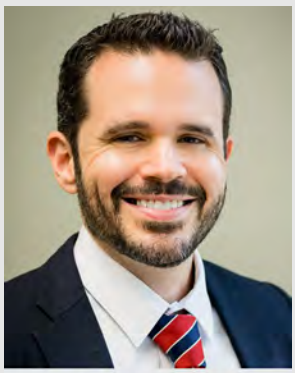

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In this edition of Florida Tax Today, Hogan discusses how retailers can avoid an unpleasant surprise on audit by ensuring that their receipts accurately reflect which amounts are taxes.

Can an ambiguous receipt create tax liability for the retailer? In Florida, the answer is yes. If an invoice or receipt can be read as a representation that nontax amounts were collected as if they were taxes, the retailer can be liable for failure to remit those amounts to the state.

This dynamic holds true even if the amounts collected were not taxes and were not due on the transaction. Because of this, a retailer can collect the correct amount of tax, print a receipt that unclearly labels a nontaxable charge as if it were a tax, and thereby create liability for failure to turn over the nontaxable charge to the state. When this is uncovered in an audit, it can be a nasty surprise to a retailer who was otherwise collecting the correct amount of tax due. Retailers should take care that their invoices and receipts are clear enough to avoid liability through representations.

The Representation That Collected Funds Are Taxes

Sales and use tax applies to nearly every retail transaction in Florida, including sales of tangible personal property, admissions, commercial rentals, and some services. Florida residents are used to paying the 6 percent state tax plus the local option tax of up to 2 percent on their purchases.[1]

The sales and use tax is imposed on the ultimate consumer of a taxable good or service.[2] Retailers are the state's collection agents for these taxes, and the amounts collected are state funds from the moment of collection.[3]

The general concept seems simple enough: If tax is due, the retailer must charge it, collect it, and remit it to the state.[4] Matters get complicated, however, when the invoice or receipt given to a customer is unclear about how much tax was actually charged.

The complication stems from Florida Statutes section 213.756(1). This statute provides that "funds collected from a purchaser under the representation that they are taxes provided for under the state revenue laws are state funds from the moment of collection."[5]

But what does representation mean in this context? The answer is unclear. Though the statute

[1] Though services are generally not subject to Florida's sales and use tax, some services, such as commercial cleaning services and alarm system services, are taxable. *See* Fla. Stat. section 212.05(1)(a), (i) (tax is generally due on all sales of tangible personal property and is due on specified services).

[2] Fla. Stat. section 212.12(12) (tax is only imposed on the ultimate consumer or last transaction to prevent pyramiding of taxes).

[3] Fla. Stat. section 212.12(1) (dealer's duty to collect tax, with a credit allowance for collection costs); and Fla. Stat. section 212.15(1) (taxes are state funds from the moment of collection).

[4] Retailers must turn tax amounts over to the state in a timely manner. Failure to do so can generate liability for penalties and interest, and can result in criminal prosecution. Fla. Stat. section 213.24 (penalties and interest); and Fla. Stat. section 212.15(2) (criminal penalties).

[5] Fla. Stat. section 213.756(1).

has not materially changed since 1991, the Department of Revenue has not yet issued a regulation defining what constitutes a representation to a purchaser that collected funds are taxes. These types of questions are inherently fact-specific. Because of this, the DOR can see things quite differently than the retailer.

The Curious Case of *Daytona Wheels*

The difference of opinion that can arise between the DOR and a retailer is illustrated by *Daytona Wheels Inc. v. Department of Revenue*.[6] In *Daytona Wheels*, the question was whether a cost-recovery fee listed by a tire vendor on the same invoice line item as a state-imposed environmental fee became state funds because it was not separately stated.[7]

The fee charged by the tire vendor was a cost-recovery tool. It was charged to the customer on the same invoice line as the state-imposed fee. The vendor retained the cost-recovery fee and remitted only the state-imposed fee to the government. In an audit, the DOR assessed the cost-recovery fee against the vendor because it was not separately stated on the invoice.[8]

The potential for differing conclusions about facts like these is illustrated by what happened after the assessment. The taxpayer initiated an administrative challenge to the assessment, which resulted in a recommended order sustaining it. The administrative law judge found that the vendor's charge was part of the state's funds because it was not separately stated.[9]

However, on appeal, the Fifth District Court of Appeal came to the opposite conclusion. On the same facts, applying the same law, the court held that the vendor's fee did not become state funds even though it was not separately stated. The court held that:

> Although we agree that stating the state fee separately would make for an easier audit and is a justified requirement, we do not read into the state policy behind the "separately stated" requirement an intent to forfeit monies collected for a similar purpose but included within the same heading on an invoice.[10]

Daytona Wheels shows that the question whether a combined line-item charge that includes a vendor's cost-recovery fee and a state-imposed fee or tax can be considered state funds is not a simple black-and-white inquiry. The mere observation that a vendor's fee is not separately stated is not the end of the inquiry. Instead, it is one fact among many that must be considered.

How Can a Retailer Challenge the DOR's View?

A retailer that receives an assessment like that in *Daytona Wheels* does not have to simply agree with the DOR's conclusion. The retailer should engage in a two-pronged effort to solve the problem both for the audit period and in the future.

Taxpayers have a variety of ways to challenge an audit assessment. In all the challenge mechanisms, the key is whether the statutes and regulations that impose a tax are truly applicable to the facts at hand.[11]

To challenge the DOR's conclusions that a charge has been represented as a tax, the retailer will first have to look at the specific receipt and invoice types that were issued during the audit period. The invoices or receipts that created the problem may not have been uniform throughout the audit period.

The retailer can develop its facts by examining the terms and conditions of sales that took place through a website. The fine print accompanying online sales transactions can clearly show that nontaxable charges were not represented as taxes. As in *Daytona Wheels*, these facts will dictate the structure of the argument. Ultimately, the retailer must show that the charges at issue were not represented to the ultimate consumer as though they were taxes.

[6] 752 So. 2d 62 (Fla. Dist. Ct. App. 2000).

[7] *Daytona Wheels*, 752 So. 2d at 63.

[8] *Id.*

[9] *Daytona Wheels Inc. v. Department of Revenue*, DOAH Case No. 95-4771 (Dec. 14, 1998).

[10] *Daytona Wheels*, 752 So. 2d at 63.

[11] It is beyond the scope of this article to discuss the various types of proceedings taxpayers can use to challenge an assessment. For an excellent treatment of this issue, see Mark E. Holcomb, "Department of Revenue," in *Florida Administrative Practice*, Ch. 9 (2017).

Finally, the retailer should develop a strategy to solve the problem going forward. The problems identified by the DOR can often be remedied through software changes that create less ambiguous invoices and receipts. There should be no ambiguity in how the nontaxable charges are listed after the appropriate changes are made.

Conclusion

Retailers should make sure that their invoices and receipts clearly show the amount of the total retail sale that is attributable to Florida sales tax. Failure to attend to this can create unexpected liability for amounts that were never tax-related. ■